No. 82-1988

In the Supreme Court of the United States

OCTOBER TERM, 1983

BRUCE TOWER, Public Defender
of Douglas County, Oregon, and
GARY BABCOCK, Public Defender
of the State of Oregon,

Petitioner,

v.

BILLY IRL GLOVER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 31, 1983
CERTIORARI GRANTED OCTOBER 3, 1983

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Dec. 12, 1980—Glover files Complaint in the United States District Court for the District of Oregon against Bruce Tower, Public Defender of Douglas County, Oregon, and Gary Babcock, Public Defender of the State of Oregon for punitive damages under 42 U.S.C. § 1983. Glover's Complaint alleges that defendants Tower and Babcock conspired with state officials acting under color of state authority to deprive him of his civil rights.

Jan. 28, 1981—Motion to Dismiss filed in the United States District Court for the District of Oregon.

Feb. 13, 1981—Glover files Traverse to defendants' Motion to Dismiss along with a supporting Affidavit.

Mar. 3, 1981—Glover files Memorandum to the court in support of Traverse.

Apr. 1. 1981—Order of United States District Court entered granting defendants' Motion to Dismiss and dismissing action.

Apr. 3, 1981—Judgment of United States District Court entered dismissing action.

Apr. 4, 1981—Glover files Notice of Appeal in the United States Court of Appeals for the Ninth Circuit.

Mar. 1, 1983—Opinion of the United States Court of Appeals for the Ninth Circuit filed.

May 31, 1983—Tower and Babcock's Petition for Writ of Certiorari filed and docketed.

Oct. 3, 1983—Certiorari granted.

PLAINTIFF'S COMPLAINT

[Filed December 12, 1980]

FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

In the United States District Court
For the District of Oregon

BILLY IRL GLOVER, Plaintiff
[Enter above the full name of the plaintiff in this action.]

COMPLAINT

v.

Civil No. 80-6720-E

BRUCE TOWER
Douglas County Public Defender
GARY BABCOCK,
Oregon State Public Defender
Defendants
[Enter above the full name of the defendant or defendants in this action]

ACTION UNDER TITLE 42 U.S.C. 1983, 1981, 1982 & 1985 (3) & related statutes governing CONSPIRACY BY STATE OFFICIALS ACTING UNDER COLOR OF STATE AUTHORITY TO DEPRIVE PLAINTIFF OF HIS CIVIL RIGHTS AS OUTLINED HEREIN.

I. Previous lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?
Yes [ ] No [X]

BUT THERE IS A RELATED CASE PRESENTLY BEING LITIGATED (Your File # 80-6371-E)

B. If your answer to A is yes, describe the lawsuit in the space below. [If there is more than one lawsuit describe the additional lawsuits on another piece of paper, using the same outline.]

1. Parties to this previous lawsuit

Plaintiffs N/A

Defendants N/A

2. Court [if federal court, name the district; if state court, name the county]

N/A

3. Docket Number N/A

4. Name of judge to whom case was assigned N/A

5. Dispostion [for example: Was the case dismissed? Was it appealed? Is it still pending?]

N/A

6. Approximate date of filing lawsuit N/A

7. Approximate date of disposition N/A

II. Place of Present Confinement OREGON STATE PENITENTIARY

A. Is there a prisoner grievance procedure in this institution?

Yes [XX] No [ ]

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure?
Yes [ ] No [XX]

C. If your answer is YES,

1. What steps did you take? N/A

2. What was the result? N/A

D. If your answer is NO, explain why not This is NOT a prisoner grievance type suit but a suit against other officials acting under state authority.

E. If there is no prison grievance in the institution, did you complain to prison authorities? N/A

F. If your answer is YES,

1. What steps did you take? N/A

2. What was the result? N/A

III. Parties

[In item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.]

A. Name of Plaintiff BILLY IRL GLOVER

Address Box 42831, 2605 State Street, Salem, Oregon 97310

[In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.]

B. Defendant BRUCE TOWER is employed as COUNTY PUBLIC DEFENDER at DOUGLAS COUNTY CIRCUIT COURT % COURTHOUSE, ROSEBERG [sic], OREGON

C. Additional Defendants GARY BABCOCK who is employed as the Oregon State Public Defender, 1655 State Street, Salem, Oregon 97310

IV. Statement of Claim

[State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If

you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.]

Bruce Tower, acting as a representative of the State of Oregon in the capacity of the Douglas County Public Defender conspired with other state officials - - including the trial court judges of Charles Woodrich and Robert Stults, who are unnamed defendants in this action since judges are immune from damages even though done with malice and forethought - - to deprive your plaintiff of his liberty by refusing to discharge his responsibilities and obligations as court appointed counsel for your plaintiff in the Douglas County Circuit Court case No. 76-0386. (SEE ADDITIONAL INFORMATION IN THE ATTACHED SUPPLEMENT TITLED "IV Statement of Claim."

V. Relief

[*State briefly exactly what you want the court to do for you.* Make no legal arguments. Cite no cases or statutes.]

From defendant Bruce Tower plaintiff asks the court to award punative [sic] damages in the amount of $5 million.

"From defendant Gary Babcock plaintiff asks the court to award punative [sic] damages in the amount of $5 million.

Signed this 30th date of October , 1980.

[Signature omitted in printing.]

I declare under penalty of perjury that the foregoing is true and correct.

[Signature omitted in printing.]

IV). Statement of Claim (Contd. from page 3 [5])

This is more than a mal-practice situation by defendant Bruce Tower as he conspired with and acted in unison with other state officials to *prevent* your plaintiff from mustering, preserving and presenting his defense in a criminal case in Douglas County (Circuit Court No. 76-0386).

In the criminal case referred to the defense proffered was THE AFFIRMATIVE DEFENSE OF MENTAL DEFECT OR DISEASE WHICH DIMINISHED OR NEGATED CRIMINAL RESPONSIBILITY.

There was ample evidence of the validity of this defense available to defendant Bruce Tower. During the entire six months defendant Tower had to prepare for the trial in the Circuit Court for Douglas County your plaintiff insisted on and pleaded with defendant Tower to search out and investigate the defense and to secure evidence that was needed; contact witnesses pertinent to the case; secure past psychiatric reports; and to otherwise research and prepare the defense.

However, state agents pursuaded defendant Tower to do nothing to prepare for the defense so that there would be a guaranteed conviction of your plaintiff. These same state agents persuaded the trial court judges of Charles Woodrich and Robert Stults to ignore your plaintiff's every request for

redress in the Douglas County Circuit Court so that these serious Constitutional errors could be corrected and your plaintiff could defend himself against those charges.

The reason these other state agents got involved in this criminal case was because your plaintiff needed certain documents from those state agents and their agencies (COMPARE FILE # 80 - 6371-E for the background setting for this case).

For the background information as to the manner in which defendant Tower carried out this conspiracy to deprive your plaintiff of his basic rights to defend himself, the Court is referred to exhibit # 1 attached which gives a rather thorough account of how this conspiracy was carried out.

Once the attached exhibit # 1 is studied it becomes evident that defendant Tower NEVER INTENDED TO ALLOW YOUR PLAINTIFF TO DEFEND HIMSELF AND THE RECORD WILL SHOW ALSO THAT HE REFUSED TO TAKE HIMSELF OFF THE CASE TOO ONCE IT WAS CLEARLY POINTED OUT THAT HE WAS TOTALLY DERELICT IN HIS RESPONSIBILITIES.

As for the involvement of the second defendant, Mr. Gary Babcock, Oregon State Public Defender, he too was enlisted by those other state agents to make certain your plaintiff DID NOT GET THE CHANCE

TO CONTEST THE ILLEGAL CONVICTION FORCED ON HIM BY THE TRIAL COURT.

Defendant Babcock was fully informed of the issues asserted by your plaintiff in pro per at the trial court lever [sic] and additionally informed as to where these issues could be found in the trial court record. But, he refused to obtain the pertinent portions of the trial court record and prepared an opening brief which was incomplete, inadequate and in error. When your petitioner rejected this opening brief and asked defendant Babcock to update it and make it adequate and correct, Mr. Babcock refused. This was a *deliberate* and knowing and informed decision to deprive your plaintiff of a fair and adequate appeal so that your plaintiff would be deprived of his liberty for a long extended time without due process of law and so that your plaintiff would once again be thrust under the authority of and at the direct mercy of former prison officials who had caused your plaintiff's emotional and psychotic break leading to the criminal charges in Douglas County.

Since your Plaintiff was an indigent all these state officials felt free to enlist these two defendands [sic] (Tower and Babcock) to conspire with them to deprive your petitioner of his basic rights and his liberty so that those state officials who had previously proved themselves dishonest could once

again have total power and control over your plaintiff. These state officials *knew* that if your plaintiff were allowed to defend himself their former dishonest actions would become public knowledge and could cause repurcussions [sic].

This conspiracy went so far that when the case was finally heard by the Court of Appeals (BASED SOLELY ON THE TOTALLY INADEQUATE, INCOMPLETE AND ERRONEOUS OPENING BRIEF FILED BY THE DEFENDANT BABCOCK) Mr. Lee Johnson, former Attorney General for Oregon who mastermined [sic] the conspiracy set forth in your file # 80-6371-E placed himself on the Court that "reviewed" plaintiff's appeal.

It should be pointed out that there is no way either defendant Tower or defendant Babcock can appear in court and defend their actions in this criminal case from Douglas County (File # 76-0386). Once the trial record is read and the communications to and from defendant Babcock concerning the appeal are reviewed then the conspiracy becomes evident. They both KNOWINGLY and deliberately deprived your plaintiff of his basic civil rights to defend himself against serious criminal charges knowing that no state court would call them to task.

Therefore, your plaintiff's only redress is through civil action via a Title 42 U.S.C. 1983. Your plain-

tiff has already demonstrated that the state courts will not give him redress.

Again your plaintiff refers this Honorable Court to the sister case of 80-6371-E together with the attached Exhibit # 1 for proof of this conspiracy by state officials who used these *two named defendant state officials* (Bruce Tower and Gary Babcock) to execute their conspiracy against this plaintiff.

[Signature omitted in printing.]

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

[Filed January 28, 1981]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Title omitted in printing.]

Come now defendants, Bruce Tower and Gary Babcock, by and through their attorney, Lisa Brown, and move the Court pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the cause of action against them for the reason that the Complaint fails to state a claim upon which relief can be granted.

This motion is supported by the Memorandum of Points and Authorities attached hereto.

[Signature omitted in printing]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

[Title omitted in printing.]

Plaintiff alleges that defendants Bruce Tower, Douglas County Public Defender, and Gary Babcock, State Public Defender, conspired with other state officials "to deprive him of his liberty" by refusing to discharge their responsibilities and obligations as court appointed trial and appellate counsel. He

brings suit under 42 USC §§ 1981, 1982, 1983 and 1985, and requests punitive damages in the amount of $5 million from each defendant.

A) *42 USC § 1983.*

The Ninth Circuit Court of Appeals held in *Miller v. Barilla*, 549 F2d 648 (9th Cir 1977), "that a public defender should be accorded absolute immunity from § 1983 damage claims for acts done in the performance of his judicial function as a public defender." *Miller, supra* at 649. The court reasoned in *Miller* that "the public defender acts in the same manner representing his client as does the prosecutor in representing the state and should be accorded similar immunity from acts arising out of that function." The court cited *Brown v. Joseph*, 463 F2d 1046 (3d Cir 1972), *cert denied*, 93 S Ct 3015, 37 L Ed2d 1003 (1973), where the court stated:

> "We perceive no valid reason to extend this immunity to state and federal prosecutors and judges and to withhold it from state-appointed and state-subsidized defenders." 463 F2d at 1048.

The policy reasons supporting absolute immunity are discussed in *Minns v. Paul*, 542 F2d 899 (4th Cir 1976), and relied on by the Ninth Circuit in *Miller, supra* at 649. In *Minns*, the court identified the policy reasons supporting absolute immunity for public defenders:

> "(a) the need to recruit and hold able lawyers to represent indigents . . ., and (b) the need to encourage counsel in the full exercise of profes-

> sionalism, i.e., the unfettered discretion, in the light of their training and experience, to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced." 542 F2d at 901.

Although the case law is inconsistent among the circuit courts, there seems to be agreement that a public defender is entitled to some degree of immunity, either absolute or qualified. The Eighth Circuit recently held that a public defender is entitled to qualified immunity and could not be subject to suit under § 1983 unless he

> " . . . acts in a manner which he knows or reasonably should know will violate the constitutional rights of his client, or if he acts with the malicious intention to injure his client. The touchstone is good faith."[1]

As public defenders have been held by the Ninth Circuit to be immune from liability in § 1983 actions, plaintiff fails to state a claim upon which relief can be granted, and his Complaint should be dismissed.

B) *42 USC §§ 1981 and 1982*

Plaintiff fails to state a claim under 42 USC § 1981 in that he fails to allege any deprivation of

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[1]The Eighth Circuit rejects the extension of absolute immunity to public defenders due to the Supreme Court's holding in *Terri [sic] v. Ackerman*, 444 US 193, 100 S Ct 402, 62 L Ed2d 355 (1979), which was a state malpractice action where it was held that an attorney appointed by a federal court to represent an indigent defendant is not entitled to absolute immunity as a matter of federal law.

equal rights under the law based on race, sex, religion or any other bases of discrimination.

Plaintiff fails to state a claim under 42 USC § 1982 in that he fails to allege any deprivation of property rights.

C) *48 [sic] USC § 1985(3)*

Plaintiff fails to state a claim for relief under 42 USC § 1985(3) which provides for civil liability upon a conspiracy to interfere with civil rights. In order to state a cause of action under § 1985(3),

> "it must be asserted that the defendants conspired to deprive a plaintiff . . . of equal protection of the laws, thereby causing injury to him or his property. *Griffin v. Breckenridge*, 403 US 88, 102-103, 91 S Ct 1790, 29 L Ed2d 338 (1971); *Lopez v. Arrowhead Ranches*, 523 F2d 924, 926-28 (9th Cir 1975); *Arnold v. Tiffany*, 487 F2d 216, 217-19 (9th Cir 1973), *cert denied*, 415 US 984, 94 S Ct 1578, 39 L Ed2d 881 (1974)." *Briley v. State of California*, 564 F2d 849 (9th Cir 1977).

In *Griffin*, the Supreme Court made it clear that § 1985 only applied to conspiratorial interferences with the rights of others which were founded upon "some racial or perhaps otherwise class-based, invidiously discriminatory animus." 403 US at 101-02, 91 S Ct at 1798.

As plaintiff fails to allege that either of the public defenders' actions were motivated by racial or any other invidiously discriminatory animus, his Complaint fails to state a claim under § 1985(3) and should be dismissed.

For the foregoing reasons, defendants respectfully request an order dismissing plaintiff's Complaint and denying plaintiff's requested relief on the ground that plaintiff fails to state a claim upon which relief can be granted.

[Signature and certification omitted in printing.]

TRAVERSE TO DEFENDANTS' MOTION TO DISMISS AND ANSWER TO COMPLAINT

[Filed February 13, 1981]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

[Title of case omitted in printing]

Comes now Plaintiff and traverses the Answer given by the defendants in the above titled case and shows why the action cannot be dismissed as a matter of law.

First, on or about January 30, 1981 Plaintiff received an answer from an attorney purportedly representing defendant Bruce Tower. The attorney's name is Robert E. Franz, Jr. located at 767 Willamette Street, Suite 304, Eugene, Oregon 97401. Subsequently Mr. Franz has notified Plaintiff that in fact he is not representing defendant Tower but that the Oregon State Attorney General's Office is representing both defendants Tower and Babcock. Therefore, Plaintiff is proceeding on this presumption that the Oregon State Attorney General's Office is acting as defense counsel for both defendants.

In the answer and motion for dismissal, defense counsel Lisa Brown, Assistance [sic] Attorney General for the state of Oregon, asked for dismissal claiming that the 9th Circuit Court's postion in Miller v. Barilla, 549 F 2d 648, (1977) should

prevail. The 9th Circuit held "that a public defender should be accorded absolute immunity from § 1983 damage claims for acts done in the performance of his judicial function as a public defender." Miller, supra, at 649.

Obviously defense counsel did not read the claim set forth in this action. The claim set forth was *NOT concerning the performance of judicial function as a public defender.* The claim set forth was CONSPIRACY TO DEPRIVE THIS PLAINTIFF OF BASIC CIVIL AND CONSTITUTIONAL RIGHTS. In his claim of action this plaintiff did clearly state that this was *NOT* a "mal-practice" suit. What is involved here is far more serious that [sic] a mere mal-practice suit based on dereliction of official duty. Neither is this plaintiff claiming that the defendants were merely negligent and inadvertantly neglected or failed to perform some particular function.

WHAT IS SPECIFICALLY CHARGED IS AN OVERT ACT OF CONSPIRACY BETWEEN THE TWO DEFENDANTS AND OTHER STATE OFFICIALS TO DEPRIVE THIS PLAINTIFF OF HIS BASIC CIVIL AND CONSTITUTIONAL RIGHTS.

SINCE CONSPIRACY TO DEPRIVE A PERSON OF HIS BASIC CIVIL RIGHTS IS A FEDERAL CRIME AS WELL AS A VIOLATION OF FEDERAL STATUTES THEN IN NO WAY WOULD THE

DEFENDANTS BE IMMUNE FROM EITHER DAMAGES OR PROSECUTION SIMPLY BECAUSE THEY WERE EMPLOYED BY A PUBLIC DEFENDER AGENCY.

The United States Supreme Court in Mitchum v. Foster, 92 S.Ct. at 2162; 407 U.S. at 242 (Headnotes 13-15) said:

> "The very purpose of § 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights - - to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or *JUDICIAL*.' (emphasis added). Ex parte Virginia 100 U.S., at 346; 25 L. Ed. 676"

In Headnote 11, the Supreme Court held that:

> "It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce provisions of the Fourteenth Amendment 'against State action, . . .whether that action be executive, legislative, or JUDICIAL.'" (emphasis added, at page 2161 of 92 S. Ct. (407 U.S. at 240).

As the Supreme Court further noted, at page 2161:

> "'If the State courts had proven themselves competent to suppress the local disorder, or to maintain law and order, we should not have been called upon to legislate. . . . We are driven by existing facts to provide for the several states. . .the full and complete administration of justice in the courts. And the courts with reference to which we legislate must be the United States courts.' Id. at 653. And Representative

> Perry concluded: 'Sheriffs, HAVING EYES TO SEE, SEE NOT: JUDGES, HAVING EARS TO HEAR, HEAR NOT; WITNESSES CONCEAL THE TRUTH OR FALSIFY IT; GRAND AND PETIT JURIES ACT AS IF THEY MIGHT BE ACCOMPLICES. . .ALL THE APPARATUS AND MACHINERY OF CIVIL GOVERNMENT, ALL THE PROCESSES OF JUSTICE SKULK AWAY AS IF GOVERNMENT AND JUSTICE WERE CRIMES AND FEARED DETECTION. AMONG THE MOST DANGEROUS THINGS AN INJURED PARTY CAN DO IS TO APPEAL TO JUSTICE.' Id., at App. 78." (emphasis added).

The purported purpose for the public defender system is to provide meaningful legal assistance for the indigent facing criminal charges. Counsel for the defendants is claiming that the defendants (and all attorneys employed in a public defender role) should be free to *conspire* with the state at will to deprive indigents of their basic rights by SELLING OUT THOSE INDIGENTS IN EXCHANGE FOR FAVORABLE ACTION FOR THOSE CHARGED WITH CRIMES WHO ARE ABLE TO BRIBE THEIR WAY OUT OF THE CHARGES. Defense counsel would have this court believe that such a conspiracy and "selling out" is to be regarded as a part of "the performance of his judicial function as a public defender." (Miller, supra,).

Such a position is totally untenable. Such a position would totally destroy the public defender system and the purpose for which it was created. Such a position would totally negate the Sixth

Amendment right to "assistance of counsel" since the public defender would not be functioning as an integral part of the advesary [sic] system *but* as:

> ". . .an organ of the state interposed between. . .(the). . .defendant and HIS RIGHT TO DEFEND HIMSELF. . . and the right to make a defense is stripped of the personal character upon which the Amendment INSISTS. . .UNLESS THE ACCUSED ACQUIESCED IN SUCH REPRESENTATION, the defense presented is NOT the defense GUARANTEED HIM BY THE CONSTITUTION, for in the very real sense, IT IS NOT HIS DEFENSE." (Faratta v. California, 95 S.Ct. 2533; 432 U.S. at 829 (June 1975). (Emphasis added by plaintiff).

Such a position as claimed by the counsel for the defendants would totally destroy the advesary [sic] system itself. If the court appointed attorney is not responsible for his actions and *liable for his conspiracies* then no one would be safe because the state could at any time deprive any indigent of his life, liberty and property by appointing to him counsel willing to sell the indigent's rights out to the state and its interests.

Such a position would additionally bring the court itself into reproach and disdain. Such a position would destroy the integrity of the BAR itself. Yet, one of the basic rules of the Bar is that "No practice must be permitted (such as granting absolute immunity to lawyers serving as public defenders who *conspire* with the state to deprive their

charges of basic civil and constitutional rights) which invites toward the ADMINISTRATION OF JUSTICE A DOUBT OR DISTRUST OF ITS INTEGRITY (citation)" (see page LXV of the February 24, 1970 ABA *Code of Professional Responsibility*, footnotes 12 (1) and (2). (emphasis added by plaintiff).

And, perhaps more important, such a position would establish the public defender system as a hoax, fraud and sham foisted upon the public and costing millions and millions of dollars annually to continue such a fraud. If the public defender is not *accountable for such conspiracies* with the state against his client then the indigent would be a lot better off without his services for without his services the indigent would merely be standing alone and naked against the trial judge and the prosecutor *rather than* standing alone and naked against the judge, the prosecution *and* the lawyer who allegedly was protecting his interests when in actuality he was a secret agent of the state.

Plaintiff points out that the circumstances and conditions of Miller, supra, were totally different from those which are evidenced in this case at bar. Miller's claim was that his trial judge, the assistant district attorney and a deputy public defender *misrepresented certain factors* to him thus inducing him to waive his rights to a jury trial and enter a

guilty plea in a plea bargain which was not respected. Since Miller's claimes [sic] primarily involved an alleged broken plea bargain, his redress was clearly through other means and not a § 1983 action claim.

However, in Miller, supra, the 9th Circuit cited Minns v. Paul, 542 F 2d 899 (4th Cir.) and stated that the reasoning of the 4th Circuit Court was persuasive. The Minns, supra, court reasoned that public defenders should be accorded immunity because:

> "Basically there are two (reasons): (a) the need to recruit and hold able lawyers to represent indigents - - both full and part-time public defenders, as well as private practicioners [sic] appointed by courts to represent individual defendants or litigants, and (b) the need to encourage counsel in the full exercise of professionalism, i.e., the unfettered discretion, in the light of their training and experience, to decline to press the frivilous, [sic] to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be advanced." (at page 901).

Plaintiff calls specific attention to the fact that both the Minns Court (4th Circuit) and the Miller Court (9th Circuit) and additionally the court of Brown v. Joseph, 463 F 2d 1046 (3rd Circuit) cited by the 9th and the 4th circuits in reaching their decisions, did not deal with or address the OVERT ACT OF CONSPIRACY. In ALL CASES THE COURTS STIPULATED OR HELD THEIR CONCLUSIONS WERE BASED ON "PUBLIC DEFEND-

ERS *ACTING WITHIN THE SCOPE OF THEIR DUTIES*. . ."

It cannot be said that when an attorney (public defender or not) CONSPIRES WITH OTHER COURT OR STATE OFFICIALS TO DEPRIVE AN INDIGENT OF HIS BASIC CIVIL AND CONSTITUTIONAL RIGHTS THAT HE IS "ACTING WITHIN THE SCOPE OF HIS DUTIES AS PUBLIC DEFENDER." Such is clearly *outside* his jurisdiction since it is a direct violation of both state and federal statutes. AS A MATTER OF LAW, THERE IS NO LEGAL BASIS FOR GRANTING SUCH AN ATTORNEY IMMUNITY FOR SUCH CLAIMS SINCE § 1983 IS THE SPECIFIC FEDERAL STATUTE LEGISLATED TO REDRESS SUCH CIVIL VIOLATIONS.

Again Plaintiff calls attention to the wording of the United States Supreme Court in Mitchum, suprs, [sic] "WHETHER THAT ACTION BE EXECUTIVE, LEGISLATIVE, OR *JUDICIAL*." (emphasis added). Even if public defenders did enjoy absolute immunity WHEN SPECIFICALLY PERFORMING THEIR OFFICIALS [sic] DUTIES, (and the 8th Circuit just recently held that they are not so immune - - as will be seen later in this brief), THEIR ALLEGED IMMUNITY WOULD CEASE THE MOMENT THEY ENGAGED IN AN OVERT ACT OF CONSPIRACT [sic] - - WHICH WOULD BE CONDUCT,

BEHAVIOR AND ACTIONS OUTSIDE THEIR OFFICIAL CAPACITY AND RESPONSIBILITY.

The reasoning of the 9th Circuit, the 4th Circuit and the 3rd Circuit courts that holding public defenders liable would discourage able personnel from entering the profession will not withstand objective scrutiny. For example, police officers are professionals who are liable for their conduct in § 1983 actions and yet this fact does NOT DISUADE COMPETENT PERSONNEL FROM ENTERING THE PROFESSION OF POLICE WORK. Neither does it discourage PROFESSIONALISM among police officers. Rather, it stimulates and mandates the opposite because police officers know that if they abuse their office as officers of the law they can and perhaps will be held liable for damages incurred.

The same reasoning is true with all professions. Quality professionals are not discouraged from entering the medical profession, or any other profession in which a § 1983 action would hold, because they can be held liable for their actions. Such liability IMPROVES THE QUALITY OF THE PROFESSIONAL CONDUCT. It cannot be logically argued that holding lawyers liable for their actions would diminish the quality of performance.

This is clearly borne out by the decisions of the Supreme Court in Ferri v. Ackerman, 100 S. Ct. at

409 (1979- - two years after the 9th Circuit's decision in Miller, supra).

> "The fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim DOES NOT CONFLICT WITH PERFORMANCE OF THAT FUNCTION. *If anything*, IT PROVIDES THE SAME INCENTIVE FOR APPOINTED AND RETAINED COUNSEL *TO PERFORM THAT FUNCTION COMPETENTLY.* THE PRIMARY RATIONALE FOR GRANTING IMMUNITY TO JUDGES, PROSECUTORS, AND OTHER PUBLIC OFFICIALS DOES *NOT* APPLY TO DEFENSE COUNSEL SUED FOR MALPRACTICE BY HIS OWN CLIENT.
>
> "(8,9) It may well be, as respondent urges, that valid policy reasons might justify an immunity for appointed counsel that need not be accorded to privately retained counsel. See n. 17, supra. Perhaps the most persuasive reason for creating such an immunity would be to make sure that competent counsel remain willing to accept the work of representing indigent defendants. If their monetary compensation is significantly less than that of retained counsel, and if the burden of defending groundless malpractice claims and charges of unprofessional conduct is disproportionately significant, it is conceivable that an immunity would be justified by the need to preserve the supply of lawyers available for this important. Whether a significant need can be demonstrated that would justify such a rule (1/), or whether such a problem might be better remedied by adjusting the level of compensation, are questions that can most appropriately be answered by a legislative body acting on the basis

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1/ This showing that the Supreme Court is well aware of the 9th Circuit's position in Miller, supra.

> of empiracal [sic] data. THEREFORE WE DO NOT EVALUATE THESE ARGUMENTS. Having CONCLUDED that the essential OFFICE OF APPOINTED DEFENSE COUNSEL IS AKIN TO THAT OF PRIVATE COUNSEL(2/) AND *UNLIKE THAT OF A PROSECUTOR, JUDGE, OR NAVAL CAPTAIN*, WE CONCLUDE (that the federal immunity clause). . .is simply inapplicable in this case. Accordingly, without reaching any question concerning the power of Congress to create immunity, we hold that federal law does NOT NOW PROVIDE IMMUNITY FOR COURT APPOINTED COUNSEL IN A STATE MALPRACTICE SUIT BROUGHT BY HIS FORMER CLIENT." (emphasis added).

Additionally, the Supreme Court had already held earlier in Ferri, supra, at Headnotes 6 and 7, that:

> "In contrast, the primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serve pursuant to statutory authorization in furtherance of the federal interests in *insuring effective representation* of criminal defendants, his duty IS NOT TO THE PUBLIC AT LARGE, except in that general way. HIS PRINCIPAL RESPONSIBILITY IS TO SERVE THE UNDIVIDED INTERESTS (3) OF HIS CLIENT. Indeed, an indispensible [sic] element of the effective performance of his responsibilities is the ability to act independently on the government and to oppose it in advesary [sic] litigation." (at page 409).

2/ Clearly showing that the Supreme Court does NOT concede that the position of defense counsel (public defender) is granted the same immunity as is accorded judges, prosecutors and certain other officials.

3/ The Supreme Court would most assurdly frown on conspiracy by a lawyer.

Using the principles set forth by the United States Supreme Court in its decision in Ferri, supra, the 8th Circuit Court set forth the following in what is logically the correct principle in this matter. The Court held:[4/]

> "The district court held that defendant Walsh, as a court-appointed defense counsel, enjoyed an absolute immunity akin to that enjoyed by a judge or prosecutor. This position, although it HAD BEEN ADOPTED by at least four circuits, is NO LONGER TENABLE AFTER THE RECENT DECISION OF FERRI V. ACKERMAN,. . .the Ferri Court reasoned that while the prospect of personal litigation would impede the performance of the function of prosecutor and judge, the prospect of a malpractice suit by a criminal defendant would not conflict with the competent performance of the function of criminal defense counsel. Id. 100 S. Ct. at 409. An important reason supporting common law immunity for porsecutors [sic] and judges therefore does *not support a like immunity for court-appointed attorneys.* Although Ferri involved a state malpractice action, ITS LOGIC EXTENDS TO SECTION 1983 CLAIMS; ITS BROAD HOLDING IS THAT A FEDERAL COMMON LAW IMMUNITY AVAILABLE TO PROSECUTORS AND JUDGES, Imbler v. Pachtmen, supra, 424 U.S. 409; 96 S. Ct. 984; 47 L. Ed. 2d 128; Pierson v. Ray, 386 U.S. 547; 87 S. Ct. 1213; 18 L. Ed. 2d 288 (1967) IS NOT AVAILABLE TO

4/ In White v. Bloom, 621 F 2d at 280, Headnote # 8

COURT-APPOINTED ATTORNEYS." (emphasis added).

In a footnote the 8th Circuit stated: "The Court determined that although immunity for court-appointed defense counsel might still be justified by the need to induce attorneys to represent indigent criminal defendants, that justification IS DIRECTED AT CONGRESS,[5/] NOT THE COURTS. 100 S.Ct. at 409 - 10.

In Lopez v. Vanderwater, 620 F 2d 1229, the 7th Circuit Court held that even a judge is not immune WHEN HE ACTS IN EXCESS OR OUTSIDE HIS SPECIFIC JUDICIAL CAPACITY.[6/] How much more so then would an attorney be liable for acts of conspiracy which could not be claimed as a part of his official duties and responsibilities! The court-appointed attorney is obligated to protect the rights and interests of his indigent client (AS NOTED BY THE SUPREME COURT) NOT SELL HIM OUT TO THE STATE AND ITS OFFICIALS.

Since the court-appointed attorney is paid for by the state, then certainly he can and legally is an

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5/ Since Congress has not granted public defenders such immunity then obviously they do not enjoy immunity.

6/There is certainly no legal basis for an attorney (court appointed or not) to claim that he is immune from damages resulting from conspiracy to deprive his indigent client of his basic civil and constitutional rights.

agent of the state (Cf. Lopex [sic] v. Vanderwater,[7/] supra, with Faretta v. California,[8/] supra.

In United States v. Havens, 100 S. Ct. at 1916 and 1920, the Supreme Court stated:

> ""There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.""
>
> "At any rate, what is important is that the Constitution does not countenance police (or attorney) misbehavior, even in the pursuit of truth. The processes of our judical system MAY NOT BE FUELED BY ILLEGALITIES OF GOVERNMENT AUTHORITIES (citation)" (emphasis added).
>
> ". . .by treating Fourth and Fifth (as well as Sixth) Amendment privileges as mere incentive schemes, the Court denigrates their unique status AS CONSTITUTIONAL PROTECTORS. Yet the efficacy of the Bill of Rights as bulwark of our national liberty depends precisely upon public appreciation of the special character of constitutional proscriptions. The Court is charged with the responsibility to ENFORCE CONSTITUTIONAL GUARANTEES. . ." (emphasis added).

In Gomez v. Toledo, 100 S.Ct. at 1924, the Supreme Court, in commenting on qualified or limited immunity, said that:

> ". . .whether such immunity has been established depends on facts particularly within the knowledge and control of the defendant."

In the instant case, the two defendants had the clear choice to forego participating in the conspiracy.

7/ At Headnote 9, page 1236 (620 F2d).

8/ 422 U.S. at 829.

In fact, in the ANSWER, it is noted by plaintiff that the defendants DID NOT DENY THE EXISTANCE [sic] OF THE CONSPIRACY OR THE DEPRIVATION OF BASIC CONSTITUTIONAL AND CIVIL RIGHTS. They merely claimed that they should be allowed to engage in such because they should not be held accountible [sic] or liable for such actions. Yet, at the trial of this suit the plaintiff will show clearly that he repeatedly advised both defendants that they would be held both liable and responsible for those actions evident in this case. Repeatedly the plaintiff advised both defendants that they should either begin to fulfill their official obligations or withdraw from the case - - as is clearly set forth in the ABA Codes [sic] of Professional Responsibility. Since neither defendant withdrew from the case, then both are liable for the damages incurred by the plaintiff.

The Code of Professional Responsibility makes it clear that when an attorney discovers such conspiracy and/or malfeassance, [sic] he has the obligation to either get it straightened out or to withdraw from the case. Since the defendants did not withdraw from the case once they were formally advised by the plaintiff that they would be held liable then it is evident they voluntarily and knowingly participated in the conspiracy and the resultant civil violations and that their willing and knowing actions RE-

QUIRE THAT THEY BE HELD TO ANSWER IN THE APPROPRIATE FEDERAL COURT - - pursuant to the haldings [sic] of the United States Supreme Court.

Since neither defendant denied the existance [sic] of the conspiracy; did not deny that plaintiff's basic rights were violated; did not deny that plaintiff gave them ample opportunity to withdraw and warned thet [sic] that they would be held liable; neither attempted to defend themselves at the time against plaintiff's accusations; and neither sought to be relieved but willingly participated, then obviously they must be held to answer for their actions in this conspiracy.

Again, plaintiff points out that this is *not* a "malpractice" suit but a civil claim that the defendants knowingly participated in a conspiracy to deprive him of his basic rights guaranteed by the Constitution of the United States of America and redressed in the United States District Court under 42 U.S.C. 1983.

Plaintiff prays this Honorable Court to set a time for trial of this law suit at the earliest opportunity.

[Signature and certification omitted in printing.]

File #80-6720-E

AFFIDAVIT

February 13, 1981

This is to state, under penalty of perjury, that I, Billy Irl Glover, am the plaintiff in the herein named case at bar.

That this case is inseparably connected with case number Civil 80-6371-E which is also currently before this Honorable Court. That case number 80-6371 sets forth the background for the conspiracy and some of the state officials involved and the reason they believed it expedient to join forces to deprive plaintiff of his basic rights so as to assure a conviction and committment [sic] to the Oregon State Penitentiary as a political move to try and control plaintiff and prevent him from revealing what he knows about the illegal practices of those officials - - acting under color of state authority to obstruct justice, cover embezzlement and otherwise misuse and abuse the power and authority of their offices to the hurt and injury of other people and to the hurt and injury of the peace and dignity of the state of Oregon as well as this plaintiff.

This is also to state that there was an ongoing conspiracy evident at the time that defendants Tower and Babcock came into contact with this plaintiff through their appointment as public defenders in his criminal proceedings. That both defendants were advised by plaintiff that they

should either fulfill their legal and moral obligations or immediately withdraw from the case. Despite the fact that both defendants were repeatedly told they would be held liable and accountable, they still refused to discharge their official duties toward this plaintiff and furthered this conspiracy. As a result of this conspiracy this plaintiff suffered an illegally obtained felony conviction and imprisonment which prevented plaintiff from obtaining the psychiatric assistance he needed. This not only caused further mental and emotional difficulties to the plaintiff but also to his family.

Both defendants joined this conspiracy with the specific motive and intent to prevent plaintiff from receiveing [sic] his constitutional right to proper assistance from counsel and his basic rights to proper medical and psychiatric assistance when material readily available to both defendants clearly showed that this plaintiff was suffering from a mental and emotional disease or defect. There were several psychiatric reports available which specifically stated that this plaintiff WAS MENTALLY ILL. Rather than helping this plaintiff gain the proper assistance he is entitled to by law, they chose to join the conspiracy which would make it impossible to the plaintiff to receive this help.

One of the psychiatric reports readily available to both of these defendants predicted that this plaintiff

would suffer another psychotic break and that he was comparable to "A POWDER KEY [sic] READY TO EXPLODE!" Yet, these defendants did nothing to assure that this plaintiff received the psychiatric help that he needed or to see that (as much as was possible) he did not "explode" and possibly cause harm to himself or to others.

Plaintiff suffered mental and emotional stress and suffering as a direct results [sic] of these basic civil and constitutional rights. Rather than getting the psychiatric help he needed, plaintiff had to live daily with the fear of being again thrust under the direct power and control of the same state officials who initially caused his second psychotic break.

Plaintiff also suffered a traumatic shock in being forced to recognize that the public defender system in Oregon is directly tied in with the other state officials and do not hesitate to conspire with those state officials at will to the hurt and injury of those who are unable to protect themselves.

[Signature omitted in printing.]

PLAINTIFF'S MEMORANDUM TO THE COURT IN SUPPORT OF TRAVERSE

[Filed March 3, 1981]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

[Title omitted in printing.]

The records in the above titled case show that plaintiff has traversed the defendants' ANSWER and motion to dismiss on the basis that a public defender is granted immunity for a 1983 action.

The attached exhibit is a newspaper clipping from the March 3, 1981 issue of the Salem, Oregon Statesman/Journal newspaper in which the news of the United States Supreme Court is listed. [Newspaper clipping exhibit omitted.] Note that the Supreme Court has agreed to decide the issue of whether a public defender can be sued for violating civil rights of indigent clients.

Therefore, as plaintiff pointed out, this action cannot be dismissed as a matter of law until such time as the issue involved has been resolved in the United States Supreme Court.

Plaintiff will be preparing documents seeking to get his case attached to the case going up before the Supreme Court as he believes that he has presented the basic arguments which will hold before that court.

[Signature omitted in printing.]

UNITED STATES DISTRICT COURT ORDER

[Filed April 1, 1981]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Title of case omitted in printing.]

Billy Irl Glover, plaintiff, brings this civil rights action pursuant to 42 U.S.C. 1981, 1982, 1983 and 1985(3), alleging that his public defenders at trial and on appeal inadequately represented him, and conspired with the trial judge and other unnamed officials to secure his conviction of a felony. Plaintiff is presently incarcerated in the Oregon State Penitentiary.

Defendants deny that plaintiff has stated a claim for relief, and move for dismissal.

Plaintiff has not stated a claim under 42 U.S.C. § 1981 or 1982 because he has not alleged a racially-motivated deprivation of rights or property. *Des Vergnes* v. *Seekonk Water District*, 601 F.2d 9 (1st Cir. 1979); *Jones* v. *Mayer*, 392 U.S. 409 (1968).

Plaintiff has not stated a claim under 42 U.S.C. § 1985(3) because he has not alleged that the conspiracy was founded upon "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971).

Finally, plaintiff has not stated a claim under 42 U.S.C. § 1983 because public defenders are absolutely immune from liability for acts done in the performance of their judicial function. *Miller* v. *Barilla*, 549 F.2d 648 (9th Cir. 1977); *Housand* v. *Heiman*, 594 F.2d 923 (2nd Cir. 1979).

Plaintiff contends that defendants were acting outside the scope of their immunity when they conspired to secure his conviction. As evidence of this conspiracy, he claims that defendants failed to obtain certain evidence and witnesses to support his defense of mental defect or disease, and refused to withdraw as counsel, in order to allow plaintiff to represent himself. Plaintiff further alleges that the trial judge aided in the conspiracy by refusing to grant his motions for appointment of new counsel and for a new trial. The appellate court allegedly participated in the conspiracy by accepting defendant Babcock's brief, and by refusing to allow plaintiff to represent himself.

Plaintiff's claim fails to allege any actions by defendants which lie outside the scope of their judicial function. For purposes of 42 U.S.C. § 1983, public defenders have "unfettered discretion" in their decisions regarding the introduction of evidence, the presentation of witnesses, and the submission of motions.[1] Therefore, plaintiff's allegations do not strip defendants of their absolute immunity.

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[1] *Miller* v. *Barilla*, 549 F.2d at 649; *Housand* v. *Heiman*, 594 F.2d at 924-925.

Defendants' motion to dismiss is granted and this proceeding is dismissed. The Clerk is directed to enter judgment accordingly.

DATED this 1st day of April, 1981.

[Signature of Judge Robert C. Belloni
omitted in printing.]

UNITED STATES DISTRICT COURT
JUDGMENT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

[Filed April 3, 1981]

BILLY IRL GLOVER,	)	
	)	
Plaintiff,	)	Civil No. 80-6720-E
	)	
	)	JUDGMENT
v.	)	
	)	
BRUCE TOWER etc. et al	)	
	)	
Defendant.	)	

This action is dismissed.

Dated: April 3, 1981.

[Signature omitted in printing.]

NOTICE OF APPEAL

[Filed April 7, 1981]

IN THE UNITED STATES DISTRICT COURT
DISTRICT FOR OREGON

[Title omitted in printing.]

Comes now your plaintiff and serves notice of appeal of the order issued by judge Robert Balloni [sic] dated April 3, 1981.

See the attached Petition for a Certificate of Probable Cause for the basis for this appeal.

[Signature and certification omitted in printing.]

UNITED STATES DISTRICT COURT OPINION

[Filed March 1, 1983]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BILLY IRL GLOVER,	)	
Plaintiff-Appellant,	)	
	)	CA No. 81-3199
vs.	)	DC No. CV 80-6720
BRUCE TOWER, Public Defender of Douglas County, Oregon and GARY BABCOCK, Public Defender of the State of Oregon,	)	OPINION
Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Oregon
Honorable Robert C. Belloni,
District Judge, Presiding

Argued and Submitted December 7, 1982

Before: GOODWIN, PREGERSON and CANBY, Circuit Judges

CANBY, Circuit Judge:

Glover appeals the district court's dismissal of his civil rights action. The complaint, which was filed by Glover pro se, alleged that the public defenders

who represented him in a prior state criminal action violated the provisions of 42 U.S.C. §§ 1981, 1982, 1983 and 1985(3) by conspiring with various public officials to violate his constitutional rights. The district court held that Glover had failed to state a claim upon which relief could be granted and dismissed his action.

Glover alleged that his public defenders at trial and on appeal violated his constitutional rights by conspiring with the trial judge, the Oregon Court of Appeals and other named and unnamed state officials to secure his conviction on a felony charge brought by the State of Oregon. He alleged that defendant Tower intentionally failed to obtain evidence to support his defense of mental defect and refused to withdraw as counsel to allow Glover to represent himself. He further alleged the existence of a conspiracy between Tower and the trial judge to secure his conviction. In furtherance of that conspiracy, the trial judge allegedly denied Glover's motions for new counsel and for a new trial. The Oregon Court of Appeals is alleged to have participated in the conspiracy by accepting defendant Babcock's appellate brief over Glover's objections and by refusing to allow Glover to represent himself during the appeal.

Glover also alleged that Babcock, as public defender administrator, appointed himself to repre-

sent Glover on appeal to insure that his conviction would be upheld. Similarly, he alleged that Judge Lee Johnson had himself placed on the panel which was to hear Glover's appeal to insure that his conviction would be affirmed. Judge Johnson had been attorney general at the time of Glover's trial and was named to the Oregon Court of Appeals during the interim.

The district court held that Glover had failed to allege anything in the nature of racial discrimination, necessary for section 1981 and 1982 claims, or the type of class-based discrimination necessary for a section 1985(3) claim. No extended discussion of these holdings is required. The district court was correct and that portion of its judgment is affirmed. *See London v. Coopers & Lybrand*, 644 F.2d 811, 818 n.4 (9th Cir. 1981); *Griffin v. Breckenridge*, 403 U.S. 88 (1971). Glover's contention on appeal that he was treated less favorably as an indigent than he would have been had he been affluent enough to retain his own lawyer does not, in our view, make out a proper class-based 1985(3) claim.

The district court also held that Glover's remaining claim under section 1983 failed to state a cause of action because public defenders are absolutely immune from suit under section 1983. That portion of the court's ruling was error and we reverse.

In *Miller v. Barilla*, 549 F.2d 648 (9th Cir. 1977), this court adopted the rationale of *Minns v. Paul*, 542 F.2d 899 (4th Cir.), *cert. denied*, 429 U.S. 1102 (1976), and announced a rule of absolute immunity for public defenders under section 1983. We reasoned that absolute immunity would encourage able lawyers to represent indigents and encourage counsel in "the full exercise of professionalism . . . ." *Miller v. Barilla*, 549 F.2d at 649 (*quoting Minns v. Paul*, 542 F.2d at 901). We concluded that there was no valid reason to treat public defenders differently from prosecutors and judges in this regard.

The district court understandably felt itself bound by *Miller*.[1] Our review of a subsequent Supreme Court case, *Ferri v. Ackerman*, 444 U.S. 193 (1979), has convinced us that *Miller* is no longer good law. In *Ferri*, the Court held that an attorney appointed to represent an indigent criminal defendant in a federal prosecution was not entitled , as a matter of federal law, to absolute immunity in a subsequent state malpractice action. The Court explained that appointed counsel are subject to the same duties and obligations as retained counsel. The Court distinguished the public defender from a judge or prosecutor, noting that the latter serve broad societal interests and are subject to conflicting claims. Immunity is necessary to forestall an

atmosphere of intimidation, and to insure that they have maximum ability to deal fearlessly with the public. In contrast, the public defender is obligated to serve the undivided interest of his client. *See Sellars v. Procunier*, 641 F.2d 1295, 1299 n.7 (9th Cir.), cert. denied, 102 S.Ct. 678 (1981); *see also Polk County v. Dodson*, ___ U.S. ___ , 102 S.Ct. 445 (1981)(public defender is the functional equivalent of a privately retained attorney).

Ferri did not actually overrule *Miller* because the issue presented was limited to federal preemption of state law governing immunity in malpractice actions. *See Black v. Bayer*, 672 F.2d 309 (3d Cir. 1982)(reaffirming rule of absolute immunity for public defenders). Nonetheless, the *Ferri* Court's refusal to extend the immunity accorded judges and prosecutors to appointed counsel undercuts the basis for *Miller*. *See Hall v. Quillen*, 631 F.2d 1154 (4th Cir. 1980)(*Ferri* casts considerable doubt on the continuing validity of *Minns*), *cert. denied*, 102 S.Ct. 999 (1982); *White v. Bloom*, 621 F.2d 276, 280 (8th Cir. 1980)(public defenders subject to suit under section 1983), *cert. denied*, 449 U.S. 995 (1980), 449 U.S. 1089 (1981).

We conclude that *Miller* cannot survive the rationale of *Ferri*, and that *Ferri* and *Polk County v. Dodson*, *supra*, are inconsistent in principle with any immunity, qualified or absolute, of public defenders

charged with conspiring with state officials in violation of 42 U.S.C. § 1983. We reach this conclusion with some reluctance, because we are mindful of the burden our decision may place on already-overburdened public defenders' offices. Nevertheless, we can construe *Ferri* and *Polk County* no other way.

AFFIRMED in part, REVERSED in part and REMANDED.

Footnotes

1. The district court did not address the preliminary issue of whether Glover alleged that defendants acted under color of state law. "[A] public dfedner does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Polk County v. Dodson*, ___ U.S. ___ 102 S.Ct. 445, 453 (1981). Thus a suit alleging constitutional violations on the part of a public defender acting alone would not state a claim under section 1983. In this case, however, Glover alleged that the public defenders conspired with state officials. Private parties who conspire with a state official acting in his official capacity do act under color of state law. *Dennis v. Sparks*, 449 U.S. 24, 29 (1980). In *Sparks*, the Court held that a complaint which alleged a conspiracy between a state judge and two private defendants to cause an injunction to be corruptly issued, satisfied the color of state law requirement. Glover's allegations of conspiracy were somewhat vague. On remand the district court may require more specificity, but at this stage we are satisfied that Glover's allegations of color of state law are not fatally deficient on their face.

UNITED STATES DISTRICT COURT
DOCKET SHEET

DATE	NR.	PROCEEDING
1980		
Dec 12	1	Motion for Leave to Proceed in Forma Pauperis
12	2	ORD allowing pltf to proceed f/p; directing complt to be filed and served upon defts.
12	3	Complaint
12	-	issd summons
1981		
Jan 9	4	Retn of serv of s/c - deft Babcock served 1/8/81.
19	5	Retrn of servc of s/c on Deft. Tower - EXECU 1/12/81
29	6	Defts' mot to dism w/memo. MC 2/24/81 na
Feb. 2	7	Pltf's notice to court that a traverse will be filed within 20 days.
18	8	Pltf's Travers to defts' Motion to dismiss and Answer to Complaint.
Mar 4	9	Pltf's memo to court. Docket Check: 5/10/81
Apr 3	10	Ord - defts' mot to dism granted & action dism. BE

3	11	Judgment - action dismissed. Entered: 4/3/81. Clerk
3	--	Copies of #10 & 11 mailed to plf & Atty Gen w/entry date endorsed on #11.
7	12	Pltf's NOTICE OF APPEAL fr judgment entered 4/3/81
		#11 microfilmed 4/13/81
May 1	-	Mailed Certificate of Record to Court of Appeals
1	-	Mailed copy of Certificate and docket to Assist. Atty General Lisa Brown.
1	-	Mailed copy of Certificate, Docket and file to Plaintiff.
Jun 11	13	Appellant's Designation of Records
Jul 27	14	Copy of Order from Court of Appeals granting Appellee until 8/12/81 to file its brief.
Aug 13	15	Appellee's Designation of Clerk's Record
19	--	Mailed Clerk's Record on Appeal
19	--	Mailed copy of Title Page, Index, Certificate and docket to plaintiff and Assistant Attorney General James Mountain, Jr.